

WILLIE BILLINGTON §
v. § CIVIL ACTION NO. 6:10cv162
DIRECTOR, TDCJ-CID §

The Petitioner Willie Billington, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Billington was convicted of burglary of a habitation in 2001, receiving a sentence of 14 years in prison. He sought federal habeas corpus relief concerning this conviction in November of 2002, which was denied. Billington v. Director, TDCJ-CID, civil action no. 6:02cv558 (E.D.Tex., dismissed with prejudice June 28, 2003, no appeal taken).

The present petition is thus the second which Billington has filed concerning this same conviction. He did not show that he had received permission from the Fifth Circuit Court of Appeals to file a successive petition, as required by 28 U.S.C. §2244(b)(3), and so the Magistrate Judge recommended that the petition be dismissed until Billington received such permission. Billington did not object to the Report; instead, he asked that his petition be withdrawn. The Court construed this as a motion for voluntary dismissal and granted it, dismissing the petition without prejudice on July 8, 2011.

Two months later, on September 12, 2011, Billington filed a motion for relief from judgment under Rule 60(b), Fed. R. Civ. P. This motion argued the merits of Billington's petition and asked for a hearing, but made no mention of the fact that the petition is successive. On September 15, 2011, the Magistrate Judge issued a Report recommending that the motion be denied. The Magistrate Judge observed that Billington had sought permission to file a successive petition, but that this permission had been denied on July 8, 2011.

Billington filed objections to the Magistrate Judge's Report on September 29 and October 5, 2011. These objections are identical. Billington argues that he has newly discovered evidence and so it would be a fundamental miscarriage of justice not to consider his claims on the merits. He cites Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007), which held that under the facts of that case, the petitioner's motion for relief from judgment from the denial of habeas relief was not itself a successive petition. In Billington's case, by contrast, it is not the motion for relief from judgment which was the successive petition, but the petition itself, which was successive because Billington had previously sought federal habeas corpus relief a number of years earlier. Billington's argument that he has newly discovered evidence should be presented to the Fifth Circuit in a motion for leave to file a successive petition; should the Fifth Circuit grant such a motion, Billington may then proceed on the merits of his claims in district court. Because he has not secured such permission, Billington has shown no basis to proceed in district court, and his objections are without merit.

Billington has also filed a motion for an evidentiary hearing and a motion for a bench warrant to appear at the hearing. His petition was successive and he has not received permission from the Fifth Circuit Court of Appeals to file a successive petition, and so the district court lacks jurisdiction over his claims. Crone v. Cockrell, 324 F.3d 833, 838 (5th Cir. 2003). Neither of these motions have merit.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the Petitioner's motion for relief from judgment, the Report of the Magistrate Judge, and the Petitioner's objections thereto. Upon such *de novo* review, the Court has concluded that the Report


of the Magistrate Judge is correct and that the Petitioner's objections are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and the Report of the Magistrate Judge (docket no. 17) is ADOPTED as the opinion of the Magistrate Judge. It is further

ORDERED that the Petitioner's motion pursuant to Rule 60(b) (docket no. 16) is DENIED. The denial of this motion shall not prevent Billington from seeking leave to file a successive petition from the Fifth Circuit Court of Appeals. Finally, it is

ORDERED that any and all other motions which may be pending in this cause are hereby DENIED.

SIGNED this 4th day of November, 2011.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE